IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel W.A. DREW EDMONDSON in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, ET AL. Plaintiffs, vs. TYSON FOODS, INC., ET AL. Defendants,	Case No. 05-CV-0329-TCK-SAJ

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT COBB-VANTRESS, INC.'S FIRST MOTION TO COMPEL

Recent events, including Supplemental Rule 26(a) Disclosures by Plaintiff, [1] confirm that Plaintiff's refusal to disclose the information and documents which are the subject of the pending Motion to Compel (Dkt. No. 743) is part of a larger scheme to prevent this Court and the defendants from learning that Plaintiff has no proof to support the wide-ranging allegations advanced by Plaintiff in this politically motivated lawsuit. Even worse, Plaintiff has now acknowledged that he intends to conceal evidence in his possession that would exonerate Cobb-Vantress (and the other Defendants) simply because that evidence might harm Plaintiff's case against Cobb-Vantress and the other defendants.

Plaintiff apparently believes his bringing the suit in the name of the State of Oklahoma exempts him from the Federal Rules of Civil Procedure. The Federal Rules, however, do not

[1] "Plaintiff" is Oklahoma Attorney General W.A. Drew Edmondson, suing on behalf of, and in the name of, the State of Oklahoma.

countenance such gamesmanship by any party, including the State of Oklahoma and its elected officials. This Court should not tolerate Plaintiff's arrogance or his obstructive discovery tactics. Accordingly, Cobb-Vantress supplements its request for this Court to order Plaintiff immediately and fully to respond to Cobb-Vantress, Inc.'s First Set of Interrogatories and Requests for Production of Documents Propounded to Plaintiff ("First Set of Written Discovery").

BACKGROUND

Plaintiff's Unsupported Allegations

Plaintiff filed his Complaint and First Amended Complaint on June 13, 2005, and August 19, 2005, respectively.[2] The Complaint alleges reckless and illegal conduct by Cobb-Vantress purportedly resulting in the contamination of soils, water, sediment and biota throughout more than 1,000,000 acres of the Illinois River Watershed ("IRW"), and that such conduct poses an imminent and substantial endangerment to human health. *See* Complaint ¶¶ 1, 6-9, 31, 50-57, 95, 121, 126, 131, 135 and 138 (Dkt. No. 18). Plaintiff further alleges that as a result of Cobb-Vantress' "improper poultry waste disposal practices", the "lands and waters in the IRW in fact contain elevated levels" of substances such as arsenic, hormones and microbial pathogens which "can and do cause harm to the environment and pose human health hazards." Complaint ¶¶ 58-60. As an attorney and officer of the Court, Mr. Edmondson's signature on the Complaint constitutes a certification that Plaintiff has "evidentiary support" for these allegations. FED. R. CIV. P. 11(b).

[2] Hereinafter "Complaint" refers to the original Complaint (Dkt. No. 1) and the First Amended Complaint (Dkt. No. 18). Unless otherwise noted, all citations are to specific paragraphs or allegations of the "Complaint" by reference to the paragraph numbers of the First Amended Complaint in which those allegations are contained.

Plaintiff's Delay, Evasion and Circumvention of Traditional Discovery

Plaintiff's actions subsequent to the filing of the Complaint confirm that he filed this lawsuit without the "evidentiary support" required by Rule 11. Plaintiff refused for more than six months to discharge his obligation to arrange for the Rule 26(f) discovery conference because such a conference would trigger the fourteen-day period for Plaintiff to disclose the "evidentiary support" for this lawsuit in his Rule 26(a) mandatory disclosures. *See* FED. R. CIV. P. 26(f). Under Local Rule 16.1, Plaintiff was obligated to assure that a Rule 26(f) conference was held and a Joint Status Report submitted by October 11, 2005 -- 120 days from the filing of his complaint on June 13, 2005. N.D. LRCvP. 16.1. Eventually, this Court instructed Plaintiff to participate in the Rule 26(f) conference. Tr. 3/26/06 Hrg., p. 82, lns. 21-25.

During this delay, Plaintiff surreptitiously gathered the evidence he should have had when he filed this lawsuit. Plaintiff circumvented traditional discovery where evidence is collected in the light of day with fair notice to, and participation by, all parties. In doing so, Plaintiff also wrongfully limited this Court's authority to supervise discovery.

Ironically, Plaintiff put his "secret" evidence at issue by boasting that he had conducted "copious testing of the surface waters through the Illinois basin . . . [by setting] yellow barrels out there taking high flow and base flow samples." Tr. 5/17/06 Hrg. p. 16 (remarks of Plaintiff's counsel, Louis Bullock). Plaintiff represented in open Court that the test results from these samples form the basis for his "plead[ing] in this Court that those waters [the Illinois River and Lake Tenkiller] are polluted." *Id.* Plaintiff's counsel's oral statements to this Court are subject to Rule 11. *See, e.g., H.D. Brous & Co., Inc. v. Mrzyglocki*, 2004 WL 376555 (S.D.N.Y.); *O'Brien v. Alexander*, 898 F. Supp. 162, 175 (S.D.N.Y. 1995), *aff'd in part, reversed in part on other grounds*, 101 F.3d 1479 (2d Cir. 1996). Remarkably, Plaintiff trespassed on private property in

Arkansas and lands owned by the State of Arkansas without permission of the property owners to collect the samples. Now, with wanton hubris, Plaintiff refuses to disclose the results of tests run on the samples he obtained illegally. *See* Ex. 1, *Water Tests Anger Arkansas Judge*, Oklahoman (5/27/05).

Plaintiff also attempted to conduct discovery outside the supervisory powers of this Court through the issuance on October 18, 2005, of administrative warrants out of the Delaware County District Court for access to four poultry farms in the IRW for the purpose of obtaining samples. *See* Ex. 2, Administrative Warrants for Reeds, Andersons, Pigeons and Glenns. Specifically, Attorney General Edmondson entered into a secret agreement with the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") to issue the administrative warrants. *See* Ex. 3, Cooperative Agreement. After the growers targeted by Plaintiff with discovery requests masquerading as "administrative warrants" retained counsel and filed a declaratory judgment action against ODAFF, Plaintiff abandoned the administrative warrant process and reluctantly filed a Motion for Leave to Conduct Expedited Discovery (Dkt. No. 210).[3] Through this motion, Plaintiff sought and obtained access to more than twenty poultry farms in the IRW under Rule 45 for the purpose of collecting samples. Like his other test results, Plaintiff refuses to disclose the results of these tests to the poultry growers and private landowners on whose properties the samples were forcibly taken.

Plaintiff's Deficient Rule 26(a) Disclosures and Recent Supplementation

Almost one year after Plaintiff filed his first Complaint, he finally provided Rule 26(a) disclosures to Cobb-Vantress on May 1, 2006. (*See* Ex. 4, Pls. Rule 26(a) Disclosures). Over the

[3] The declaratory judgment action was dismissed without prejudice on August 15, 2006. *Joel J. Reed, et al. v. Oklahoma*, CJ2005-8975 8/15/06 Order of Dismissal Without Prejudice.

several next months, Plaintiff forwarded to Cobb-Vantress his "rolling production" of Rule 26(a)(1)(B) documents.

Given the nature and gravity of the far-reaching allegations in the Complaint, Cobb-Vantress reasonably expected that Plaintiff's Rule 26(a) disclosures would disclose at least some evidentiary support for his claims. Under Rule 26, Plaintiff was obligated to disclose "data compilations and tangible things in [his] possession, custody and control . . . ", which he "may use" to support his claims. FED. R. CIV. P. 26(a)(1)(B) Plaintiff has acknowledged that he possesses data generated from the sampling he conducted in the IRW both before and after the filing of this lawsuit. *See generally,* Pls. Mot. for Leave to Conduct Expedited Discovery (Dkt. No. 210), pp. 4, 9, 10; Tr. 3/23/06 Hrg. pp. 10, 11. Yet, none of this data was identified in Plaintiff's original Rule 26(a) disclosures. In particular, Plaintiff disclosed no evidence of elevated levels of arsenic, hormones or microbial pathogens, no evidence of contamination of water, soil or biota "resulting from" the practices of Cobb-Vantress, and no evidence of any alleged imminent and substantial endangerment to human health in the IRW. In fact, Plaintiff's original Rule 26(a) disclosures were bereft of evidence altogether. Instead, Plaintiff simply provided a personnel list for a number of state agencies and a generic description of the types of publicly available records maintained by those agencies. See Ex. 4, Pls. Rule 26(a) Disclosures, Attachments A and B. More specifically, Plaintiff's original Rule 26(a) disclosures consisted of two exhibits listing many state offices, individuals in those offices, and seemingly every document under their respective control. Volume, however, is not a substitute for the forthrightness required by Rule 26. A "party cannot defeat the purpose of Rule 26(a)(1) disclosures simply by providing a laundry list of undifferentiated witnesses." *Sender v. Mann*, 225 F.R.D. 651 (D. Colo. 2004); *see also In re Independent Service Organizations Antitrust*

Litigation, 168 F.R.D. 651, 653 (D. Kan. 1996). Similarly, general references to voluminous documents and files that may or may not contain evidence supporting claims and allegations do not satisfy Rule 26(a)(1)(B)'s requirements to identify supportive documents and data compilations. "Rule 26(a)(1) is a 'fairness rule, not a technicality;' Rule 26(a)(1) eliminates the need to 'slog through heaps of discovery material.'" *Sender*, 225 F.R.D. at 653 (quoting *Norman v. CP Rail Systems*, 2000 WL 1700137 (N.D. Ill. 2000)).

After reviewing Plaintiff's Rule 26(a) disclosures and confirming the complete absence in those disclosures of even a good faith basis for this lawsuit, Cobb-Vantress advised Plaintiff on September 15, 2006, that it intended to seek an order from this Court under FED. R. CIV. P. 37(a)(2)(A) compelling further disclosures and imposing sanctions upon Plaintiff for trying to conceal the factual basis for this lawsuit.[4] In response, on September 21, 2006, Plaintiff provided Cobb-Vantress with its Supplemental Rule 26(a) disclosures. *See* Ex. 5, Pls. Supplemental Disclosures. Plaintiff's Supplemental Disclosures indicate that the sampling data requested by Cobb-Vantress in its First Set of Written Discovery are the basis of Plaintiff's claims in this lawsuit. In particular, Plaintiff now concedes that the facts and information he "may use to support [his] claims" include the following:

a. Hydrology and high flow data
b. Chain of Custody Forms
c. Field books

[4] Federal Rule of Civil Procedure 37 provides that "if a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." FED. R. CIV. P. 37(a)(2)(A). Moreover,"Rule 37(c) provides an 'automatic sanction' if a party does not disclose information required by Rule 26(a) . . . ." *Snow v. Bellamy Mfg. & Repair*, 1995 WL 902210, at *4 (N.D. Ga. Sept. 26, 1995); *see also*, FED. R. CIV. P. 37(c)(1) and *Properties International Ltd. v. Turner*, 706 F.2d 308, 310 (11th Cir. 1983). These sanctions include the entry of an order prohibiting the disobedient party from introducing certain evidence (Rule 37(b)(2)(B)); the entry of an order striking the disobedient party's pleadings (Rule 37(b)(2)(C)); and, requiring payment of reasonable expenses, including attorneys' fees, caused by the failure to make the required disclosures (Rule 37(c)(1)).

d. Laboratory Reports
e. Field notes
f. GIS files for the IRW
g. Samples and analysis of surface water
h. Samples and analysis of ground water
i. Samples and analysis of sediments
j. Photographs of sampling
k. Photographs of integrator/grower operations
l. Plans/methodology for gathering information
m. Investigative reports of integrator/grower operations
n. Investigative reports on effects of land apply poultry waste

Ex. 5, Pls. Supplemental Disclosures, p. 1-2. This is precisely the information and documents sought in the First Set of Written Discovery, but withheld by Plaintiff under claims of work-product protection. *See* Exs. A and B to Motion to Compel (Dkt. No. 743), First Set of Written Discovery and Pls. Privilege Log.

Plaintiff's Stated Intent to Conceal "Unfavorable" Evidence

Plaintiff's recent actions demonstrate that his refusal to turn over his sampling data in response to Cobb-Vantress' written discovery requests is motivated by the Plaintiff's realization that much of the results of his environmental sampling in the IRW actually contradict rather than support Plaintiff's claims. This intent to conceal all adverse environmental sampling results is manifested in Plaintiff's attempt to limit its Supplemental Disclosures to "those trial preparation materials [i.e., facts such as sampling data] considered by the State's testifying experts." Ex. 5, Pls. Supplemental Disclosures, p. 2. Counsel for Plaintiff took a similarly shocking position in oral arguments before this Court at the August 10, 2006, hearing on the Motion to Compel:

> Q. (Court): Well, they're [the defendants] not going to get the data that does not support your position?
>
> A. (Mr. Nance): If that data were considered by an expert, they get it. If it was not considered by an expert, they don't get it.

* * *

> Q. (Court): Well, I hate to beat a dead fish but they are not going to get the stuff you don't want them to have.
>
> A. (Mr. Nance): They're not going to get stuff our experts don't consider.

Tr. 8/10/06 Hrg., pp. 180, lns. 3-7; 193, lns. 21-24.

Plaintiff's plan is clear from these remarks -- he intends to provide his experts with only those test results which he believes are favorable to his case. By enlisting others to screen out the "unfavorable test results", Plaintiff claims he will not show the "unfavorable data to his experts and, therefore, is not required to disclose them to the Defendants and this Court. Thus, unlike other litigants who are obligated to disclose all relevant facts, Plaintiff brazenly claims he is the sole judge of what facts he will produce and what facts he may conceal. Plaintiff's position mocks the entire American judicial system. It should be rejected by this Court.

Information recently disclosed in a whistleblower lawsuit against Attorney General Edmondson suggests that oppressive tactics and a tight-fisted control of information relevant to this lawsuit is the *modus operandi* of Mr. Edmondson. Employees of the Attorney General's office reportedly were instructed to "spy" on state agencies such as the Oklahoma Scenic Rivers Commission to make sure they were not doing or saying things which might undermine the Attorney General's threatened claims against the poultry industry and to "take documents from [these] state agencies without telling the agencies." *See* Ex. 6, *Muzzle Doesn't Fit River Panel Liaison*, Arkansas Democrat Gazette (9/10/06). Attorney General Edmondson's conduct is inexcusable. His attempts to avoid, at any cost, the disclosure of information potentially "harmful" to his position in this lawsuit is at war with the letter and the spirit of the Federal Rules.

ARGUMENT

A. Plaintiff's Gamesmanship Violates the Letter and Spirit of the Federal Rules

The purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action is based on a full and accurate understanding of the true facts, and, therefore, results in a fair and just resolution. *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman*, 329 U.S. at 681. To facilitate this mutual knowledge of facts, "modern instruments of discovery" have been adopted in civil cases to render trials "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Proctor & Gamble, Co.*, 356 U.S. at 682.

The most recent of these "modern instruments of discovery" was adopted in the 1993 revisions to Rule 26(a) of the Federal Rules of Civil Procedure. The 1993 amendments "impose on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial." *See* Advisory Committee Notes to 1993 Amendments. "The disclosure requirements should, in short, be applied with common sense in light of principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations." *See* Advisory Committee Notes to 1993 Amendments.[5] "Initial disclosures should provide parties 'with information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement.'" *Sender v. Mann*, 225 F.R.D.

[5] Rule 1 requires that the Federal Rules of Civil Procedure, including Rule 26(a), "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

645, 650 (D. Colo. 2004) (quoting *Windom v. FM Industries, Inc.*, 2003 WL 21939033 (D. Neb. 2003)). Initial disclosures should be "complete and detailed." *Biltrite Corp. v. World Road Markings, Inc.*, 202 F.R.D. 359, 362 (D. Mass. 2001). "The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination." *Sweeny v. Anderson*, 129 F.2d 756, 758 (10th Cir. 1942).

Plaintiff's approach to discovery in this case reflects, to a shocking degree, the "gamesmanship" which the authors of Federal Rule 26 instructed litigants to avoid. *See* Advisory Committee Notes to 1993 Amendments. "Litigants and his counsel may not properly be allowed to disregard process or procedural rules with impunity." *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.*, 19 F.R.D. 379, 384 (M.D. Pa. 1956). Mr. Edmondson enjoys no exemption from the Federal Rules. He is required to produce the evidence in his possession to support his claims, particularly where, as here, Cobb-Vantress has requested this information in its First Set of Written Discovery.

B. The Federal Rules Do Not Permit Parties to Conceal Adverse Test Data

Numerous courts have concluded that test data must be produced in environmental litigation and have sanctioned parties for trying to hide adverse test results from their adversaries. *See, e.g., Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362 (S.D. Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir. 1992); *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988) (failure to disclose groundwater sampling results in pollution case constituted "misconduct"); *In re E.I. DuPont de Nemours & Co. – Benlate Litigation*, 918 F. Supp. 1524 (M.D. Ga. 1995) ("*In re Benlate Litigation*") *rev'd on other grounds*, *In re Benlate Litigation*, 99 F.3d 363, 367 (11th Cir. 1996). The court in each of these cases held that the concealment of "unfavorable test

results" is impermissible and contrary to the notions of fair play and justice which underly the Federal Rules.

In *In re Benlate Litigation*, the court held that "Dupont had a duty under the Federal Rules to reveal the contents of and to produce all of the Alta [environmental] data and documents stemming from the tests conducted on the *Bush Ranch* Plaintiff's soils and waters." 918 F. Supp. at 1543-44. The evidence in that case revealed that Dupont hid certain test results because they were "bad" for its case. *Id.* at 1535. Dupont was sanctioned $114,000,000.00 by the trial court for flagrant violations of its discovery obligations and attempts to hide test data from other litigants. *Id.* at 1548.

Similarly, Suzuki was sanctioned in *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362 (S.D. Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir. 1992) for failing to disclose documents concerning tests conducted on Suzuki's vehicles. Like Dupont in *In re Benlate Litigation* and the Plaintiff in this case, Suzuki "deliberately withheld" the test data "because the information itself was so damaging" to its case. 148 F.R.D. at 375. Such disclosure failures are "egregious" and "ha[ve] the same result as an outright lie would have had." *Id.*

Disclosing favorable test results while concealing unfavorable test results amounts to "cheating" and constitutes a "fraud on the court." *In re Benlate Litigation*, 918 F. Supp. at 1556. As noted by the court in the *In re Benlate Litigation*:

> No party, be it an individual or a corporation can disregard the authority of the judicial branch and disempower the American jury. No party, be it an individual or a corporation, can unilaterally *decide* the evidence.

Id. (italics in original). Here, Plaintiff unabashedly proclaimed this is his precise intent. By refusing to produce unfavorable test data but reserving the right to offer test data favorable to his case, Plaintiff exhibits disdain for this Court and the Federal Rules by unilaterally deciding what

evidence is relevant. No party is permitted to conceal facts and evidence simply because those facts might not comport with the party's litigation strategy.

CONCLUSION

The central focus of this case is sampling data; it is the critical component of this litigation. Plaintiff's refusal to produce his sampling data is unjustified, disingenuous and prejudicial to the administration of justice by this Court; it also is undeniably prejudicial to Cobb-Vantress. Plaintiff's refusal to disclose test data which he acknowledges may be used to support his claims and his concealment of unfavorable test data constitutes a willful and bad faith attempt to prejudice Cobb-Vantress, Inc. (and the other Defendants). Accordingly, Cobb-Vantress supplements its pending request for this Court to order Plaintiff immediately and fully to respond to Cobb-Vantress' First Set of Written Discovery.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 17th day of October 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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